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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

NEVIN MILLER,

Plaintiff and Appellant,

v.

MARY L. MILLER, as Trustee, etc.

Defendant and Respondent.

H033089

(Santa Clara County

Super. Ct. No. MP 18846)

Appellant Nevin Miller filed a petition under Probate Code section 21320,<sup>1</sup> seeking a determination that his proposed complaint would not violate the no contest provisions of his father's will, trust, and codicil to the will. The superior court concluded that the proposed action would be a contest. Appellant maintains that the action would not be a contest because he merely wished to establish his right to property pursuant to a contract with the decedent. We agree with the superior court's ruling, however, and therefore will affirm the order.

*Background*

On January 4, 1993, the decedent, Dr. Sherwin U. Miller, and his wife, respondent Mary L. Miller, executed the Miller Family Trust of 1993, which would become irrevocable upon either trustor's death. At that point the trust estate was to be divided

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<sup>1</sup> All further statutory references are to the Probate Code.

into Trust A, the "Survivor's Trust," and Trust B, the "Residuary-Exemption Trust." The income from Trust B would be paid to the survivor during the survivor's lifetime; thereafter the trust would be divided into three trusts for the benefit of appellant; his sister, Stefani;<sup>2</sup> and respondent's mother. The principal of appellant's and Stefani's trusts would be distributed to them when they turned 50 years old. On the same day, Dr. Miller executed a pour-over will designating respondent as his personal representative, for the purpose of distributing his personal effects and managing estate assets.

Both the trust and the will contained no contest provisions. Paragraph KK of Exhibit B to the trust stated: "In the event any beneficiary under this trust shall, singly or in conjunction with other person or persons, contest in any court the validity of this trust or of the deceased trustor's Last Will or shall seek to obtain an adjudication in any proceeding in any court that this trust or any of its provisions or that such Will or any of its provisions is void, or seek otherwise to void, nullify, or set aside this trust or any of its provisions, then the right of that person to take any interest given to him by this trust shall be determined as it would have been determined had the person predeceased the execution of the declaration of trust without surviving children or issue. The trustee is hereby authorized to defend, at the expense of the trust estate, any contest or other attack of any nature on this trust or any of its provisions."

Article VI of the will stated the following: "I have intentionally omitted all my heirs, relatives and other persons who are not specifically mentioned herein, and I hereby generally and specifically disinherit each, any, and all such persons, whomsoever [*sic*] they may be, or who may be lawfully determined to be my heirs at law, except as otherwise mentioned in this Will, and if any such persons or such heirs, who, if I died

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<sup>2</sup> Appellant's sister has been referred to in various documents as Stefani, Stefanie and Stephanie. Having no basis for determining which spelling is accurate, we will use the first version, which the parties have adopted in their briefs.

intestate would be entitled or shall lawfully become entitled to any part of my estate, or if any of the devisees or legatees hereof, or their successors in interest, shall either directly or indirectly, singly, or in conjunction with other persons, seek to establish or assert any claims to my estate or any part thereof except under this Will, or shall endeavor to secure or take any part of my estate in any manner other than under or through this Will, then in any and all of the above-mentioned cases and events, I hereby give and bequeath to such person or persons the sum of ONE DOLLAR (\$1.00), and no more, in lieu of any other share or interest in my estate."

Shortly before Dr. Miller's death, he directed his attorney, Zad Leavy, to prepare deeds to transfer real property valued at approximately \$879,000 to appellant. Leavy delivered the deeds to the hospital room, where Dr. Miller signed them. On July 19, 2007, Dr. Miller executed a codicil to his will, disposing of cash and both personal and real property for the benefit of appellant and (to a lesser extent) Stefani. The codicil concluded by stating, "In all other respects, the provisions of my Will dated January 4th, 1993, shall be and hereby are approved, confirmed, republished and incorporated herein by reference." Dr. Miller died the next day, July 20, 2007.

On November 14, 2007, appellant filed an application pursuant to section 21320, requesting a determination that he would not be violating the no contest clause in the 1993 trust and will, or the 2007 codicil to the will, by filing a proposed complaint. The attached complaint asserted breach of oral contract by Dr. Miller and multiple causes of action against respondent for interfering with appellant's right to inherit and with his prospective economic advantage. Appellant proffered requests for quasi-specific performance and a constructive trust to enforce the terms of the alleged oral contract between him and Dr. Miller.

Appellant described the circumstances underlying these claims. He alleged that in 2005 and 2006 Dr. Miller had repeatedly promised to leave two-thirds of his estate, including the Town of Gorda (which he had owned since 1993), in order to facilitate

appellant's commitment to care for Stefani, who was seriously disabled by schizophrenia. According to appellant, Dr. Miller had particularly wanted the Town of Gorda to remain in the family and for appellant to run the town business, because "he did not trust [respondent's] business judgment and he was greatly concerned that [respondent] would sell this asset for less than it was worth." Dr. Miller allegedly anticipated that Gorda would yield \$750,000 a year, half of which would go to appellant and Stefani. He also allegedly promised appellant his Carmel home after respondent's death; three other properties comprised in his "Mountain property"; more than \$1,000,000 in overseas funds and \$1,000,000 in gold and silver, both to be shared with Stefani; and two thirds of the balance of his estate, half of which would be held in trust for Stefani. In exchange, appellant agreed to "do everything possible to make sure Stefani was carefully looked after and lived as fulfilling a life as possible."

In the proposed pleading appellant further recounted Dr. Miller's last days in the hospital. Respondent allegedly interfered with her husband's attempts to change his testamentary disposition and express in writing the terms of the contract between him and appellant. Specifically, between July 15 and July 20 respondent prevented Dr. Miller from discussing his expressed wishes as written down by appellant, pleaded with Dr. Miller not to give appellant what he had asked for, and refused to allow Dr. Miller to discuss his estate with appellant. Thus, according to the proposed complaint, Dr. Miller breached his agreement "either willfully or as a direct result of undue influence by [respondent]."

Respondent opposed appellant's petition, contending that the proposed action would violate the no contest clauses in the trust, will, and codicil. Those documents, respondent argued, accurately reflected Dr. Miller's testamentary intent; the complaint, on the other hand, would revise the dispositive provisions to grant appellant "the majority of Dr. Miller's assets."

The superior court agreed with respondent. It found that both the will and the trust "clearly expressed" Dr. Miller's intent that a challenge such as appellant's would constitute a contest. Accordingly, appellant was compelled "to ch[o]ose between taking under the terms of those respective documents or seeking to pursue his claims under an alleged oral contract." Addressing the codicil, the court recognized that this instrument gave appellant "significant assets over and above that which he would receive under decedent's Trust or Will." The court rejected appellant's argument that because the codicil had been executed on June 19, 2007, section 21305, subdivision (a)(3), took the action outside the reach of the no contest clauses. Because the codicil "did approve, confirm, republish and incorporate" the 1993 will, "the decedent effectively indicated his intent that the other provisions of his Will, including, but not limited to, Article VI—Disinheritance of Other Heirs and Persons, are applicable to the newly executed Codicil." The superior court thus concluded that Dr. Miller "clearly expressed his intent to give his heirs only that which he designated in his estate planning documents." The proposed action therefore "would violate the no contest clauses contained in decedent's Trust, Will, and Codicil."

### *Discussion*

#### *1. Scope of Review*

A no contest clause "essentially acts as a disinheritance device, i.e., if a beneficiary contests or seeks to impair or invalidate the trust instrument or its provisions, the beneficiary will be disinherited and thus may not take the gift or devise provided under the instrument." (*Burch v. George* (1994) 7 Cal.4th 246, 265 (*Burch*).) "In essence, a no contest clause conditions a beneficiary's right to take the share provided to that beneficiary under such an instrument upon the beneficiary's agreement to acquiesce to the terms of the instrument. [Citation.] [¶] No contest clauses are valid in California and are favored by the public policies of discouraging litigation and giving effect to the purposes expressed by the testator." (*Id.* at p. 254.)

Section 21320 permits a beneficiary to file a "safe harbor" petition to obtain a determination that a proposed legal challenge would not amount to a contest of an instrument containing a no contest penalty provision. "If a court determines that a particular proposed action would constitute a contest, the beneficiary will then be able to make an informed decision whether to pursue the contest and forfeit his or her rights under a will or to forgo that contest and accede to the will's provisions." (*Estate of Kaila* (2001) 94 Cal.App.4th 1122, 1130.) "As a general rule, the decision about whether the beneficiary's proposed action would be a will contest may not involve a determination of the merits of the action itself, a rule that 'makes sense' because the summary safe harbor procedure could otherwise 'be used to allow the very form of challenge and protracted litigation the testator sought to prevent.' " (*In re Estate of Davies* (2005) 127 Cal.App.4th 1164, 1173; but see *Estate of Ferber* (1998) 66 Cal.App.4th 244, 251-252 [noting exception when beneficiary argues clause violates public policy].)

" 'Whether there has been a "contest" within the meaning of a particular no-contest clause depends upon the circumstances of the particular case and the language used.' [Citations.] '[T]he answer cannot be sought in a vacuum, but must be gleaned from a consideration of the purposes that the [testator] sought to attain by the provisions of [his] will.' [Citation.] Therefore, even though a no contest clause is strictly construed to avoid forfeiture, it is the testator's intentions that control, and a court 'must not rewrite the [testator's] will in such a way as to immunize legal proceedings plainly intended to frustrate [the testator's] unequivocally expressed intent from the reach of the no-contest clause.' " (*Burch, supra*, 7 Cal.4th at pp. 254-255; see also *Schwartz v. Schwartz* (2008) 167 Cal.App.4th 733, 744.) Where, as here, the applicability of a no contest clause does not turn on disputed facts, we exercise independent review in construing the instrument. (*Burch, supra*, 7 Cal.4th at p. 254.)

## *2. Attack on the Will and Trust*

Appellant first contends that his proposed action lacks the "essential element of a contest" because it does not challenge the validity or the express terms of either the trust or the will, "nor does it seek to take a part of the Decedent's estate other than through the trust or will. Rather, the proposed complaint is an action to determine title or ownership of the property" and "to enforce Appellant's rights pursuant to an independent oral contract which was entered into over a decade after the Trust and Will were created." Citing section 21300, subdivision (a), appellant describes a contest as "any action identified in a no contest clause as a violation of the clause, including both direct and indirect contests." A direct contest, he explains, is one that "alleges the invalidity of an instrument based on misconduct such as fraud or undue influence," while an indirect contest challenges the validity of an instrument "based on something other than fraud, undue influence, etc." Accordingly, appellant argues, if the action does not "seek the invalidation of the Trust or Will," it is not a contest as a matter of law.

To the extent that appellant's argument rests on the definition of "contest" contained in subdivisions (a) and (b) of section 21300,<sup>3</sup> it is unpersuasive. In 1993, when Dr. Miller's will and trust were executed, section 21300 did not call for the same specificity of the instrument in identifying the particular grounds of a precluded

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<sup>3</sup> Section 21300 defines "contest" as follows: "(a) 'Contest' means any action identified in a 'no contest clause' as a violation of the clause. The term includes both direct and indirect contests. [¶] (b) 'Direct contest' in an instrument or in this chapter means a pleading in a proceeding in any court alleging the invalidity of an instrument or one or more of its terms based on one or more of the following grounds: [¶] (1) Revocation. [¶] (2) Lack of capacity. [¶] (3) Fraud. [¶] (4) Misrepresentation. [¶] (5) Menace. [¶] (6) Duress. [¶] (7) Undue influence. [¶] (8) Mistake. [¶] (9) Lack of due execution. [¶] (10) Forgery. [¶] (c) 'Indirect contest' means a pleading in a proceeding in any court that indirectly challenges the validity of an instrument or one or more of its terms based on any other ground not contained in subdivision (b), and that does not contain any of those grounds."

challenge; indeed, it did not include the words "challenges the validity of an instrument" at all. Instead, former section 21300 more generally defined "contest" as "an attack in a proceeding on an instrument or on a provision in an instrument." (Former § 21300, subd. (a).) We will not hold Dr. Miller accountable for failing to set forth the particular types of challenge that now qualify as a contest of his will or his trust, because such precision was not required at that time.

Even using the current definition, we find no merit in appellant's position, as he appears to be seeking part of the estate beyond the disposition provided in the trust, will, and codicil. Dr. Miller's testamentary instructions do not allow for the claim of breach of contract (first cause of action), the request for quasi-specific performance (eighth cause of action), the claim of a constructive trust (sixth cause of action), and the assertion of equitable estoppel (seventh cause of action). In each of these causes of action appellant would be seeking estate property he claims to be his based on an oral contract with Dr. Miller. Each belies appellant's continuing averment that he is not seeking "to take a part of the Decedent's estate other than through the trust or will." Appellant unquestionably would be seeking "an adjudication" that would "nullify, or set aside," some of the express provisions of the trust; and he would be asserting, "directly or indirectly," claims to a significant part of Dr. Miller's estate other than "under this Will," and in a manner "other than under or through" the will.

Appellant's contention that the proposed complaint is not a contest because it only asserts a contract right independent of the will and trust is based largely on appellate decisions that predate *Burch*, where the Supreme Court rejected the suggestion "that any proceeding based upon a claim of right independent of a will or trust instrument is never a contest for purposes of the no contest law." (*Burch, supra*, 7 Cal.4th at p. 261; see also *Nairne v. Jessop-Humble* (2002) 101 Cal.App.4th 1124, 1129-1130.) "A 'contest' is not confined to a *direct* attack on a will or trust instrument. [Fn. omitted.] It may include a separate legal proceeding which is designed to thwart the testator's expressed wishes."



(*Genger v. Delsol* (1997) 56 Cal.App.4th 1410, 1420.) The key inquiry is always the intent of the testator, which is determined by examining the terms of the instrument and the surrounding circumstances. "Each case depends upon its own peculiar facts and thus case precedents have little value when interpreting a trust [or will]." (*McIndoe v. Olivos* (2005) 132 Cal.App.4th 483, 487; accord, *Betts v. City Nat. Bank* (2007) 156 Cal.App.4th 222, 233.)

The cases appellant cites, whether decided before or after *Burch*, do not support his position in any event. In *Estate of Kruse* (1970) 7 Cal.App.3d 471, the action was a legitimate challenge to the accounting by the executrix; it was not an attempt to set aside the will or thwart the testator's intent but a request for an interpretation and *enforcement* of the provisions of the will. (*Id.* at p. 476.) *Estate of Strader* (2003) 107 Cal.App.4th 996, as appellant concedes, involved a dispute over litigation proceeds, which did not constitute property the decedent could have contemplated and intended to include in her disposition. Consequently, the request for distribution of those funds did not violate the no contest clause. Similarly distinguishable is *Estate of Watson* (1986) 177 Cal.App.3d 569. There the appellants filed a creditors' claim in their stepmother's estate, contending that their father had promised to give his wife all of his property except for certain bequests to the appellants, in exchange for her promise to transfer his property to appellants upon her death. The appellate court held that this action was not a contest of their father's will, as it did not challenge the terms of the will or otherwise thwart his testamentary intent. Instead, it sought to establish a "separate and distinct oral agreement" between their father and stepmother. (*Id.* at pp. 573-574.)

Finally, in *Varney v. Superior Court* (1992) 10 Cal.App.4th 1092, the petitioner was not claiming property specifically bequeathed to other beneficiaries in the will; the will had left only *percentages* of the estate to the beneficiaries, and he was seeking property promised to him in his oral contract with the decedent. The no contest clause in *Varney* was narrowly drawn; it restricted contests of any provision of the will. The

creditor's claim did not attack any provision of the will, and its successful conclusion "would not affect the other beneficiaries' right to recover the percentage of the estate left to them by the will." (*Id.* at p. 1107.) The *Varney* court distinguished the broader clause applicable in *In re Kitchen* (1923) 192 Cal. 384, where a broadly worded forfeiture clause encompassed a legatee's claim that the decedent had promised to compensate her by will in exchange for performing the duties of a daughter in the decedent's home.

Giving respect to Dr. Miller's clearly expressed intent in the no contest clauses of his will and trust compels the conclusion that those provisions prohibit actions to enforce an oral contract for property disposed of by the decedent's written bequests. The clauses are broad in scope: they state that *any* claim to the estate other than as provided in the will, or *any* attack "of any nature" on the trust or "any of its provisions" constitutes a contest that will disqualify the beneficiary. Appellant asserts a separate oral agreement that is inconsistent with the disposition provided in the will and trust. Thus, at least with regard to the first, sixth, seventh, and eighth causes of action, the lawsuit appellant wishes to file would amount to a will contest. (Cf. *Genger v. Delsol*, *supra*, 56 Cal.App.4th at p. 1422 [widow's challenge to separate stock redemption agreement amounts to contest of trust as it would "nullify key provisions of the trust" and "completely unravel the decedent's estate plan by setting aside the core of that plan."])

Appellant unsuccessfully attempts to distinguish *Nairne v. Jessop-Humble*, *supra*, 101 Cal.App.4th 1124, cited by respondent. There *Nairne* argued that he would not be violating a no contest clause by claiming the right to trust property promised him under an oral agreement with the trustors. *Nairne's* proposed action was for quiet title to the property and damages or a constructive trust for breach of contract. Like appellant, *Nairne* contended that his contract right was independent of the trust, and his claim therefore would not trigger the no contest clause of the trust. The appellate court disagreed. Distinguishing *Watson* and *Varney*, the court observed that the proposed complaint would frustrate the trustors' intent, as it directly attacked the disposition of the

property Nairne claimed. The no contest clause itself (like the one before us) was broadly written to compel forfeiture if any beneficiary directly or indirectly participated in a proceeding in which he or she sought to nullify or set aside any trust provision. (See also *Zwirn v. Schweizer* (2005) 134 Cal.App.4th 1153, 1160 [creditor's claim based on oral contract constituted contest, as it directly attacked provision of will and trust].)

Although both parties discuss the proposed complaint as a whole, the allegations directed at the personal conduct of *respondent* deserve separate consideration. The second and third causes of action assert intentional and negligent interference with the right to inherit, respectively; the fourth and fifth, intentional and negligent interference with prospective economic advantage. Appellant alleges in the second and third causes of action that respondent knew that he and Dr. Miller had "an agreement with regard to the disposition of the Decedent's property," but she has "failed to acknowledge" his rights under that agreement and "has engaged in conduct and actions resulting in the denial of Plaintiff's right to receive the benefits of the contract." The fourth and fifth causes of action assert that respondent had interfered with his prospective economic advantage by "failing to honor the Decedent's obligations under the terms of the oral contract between Decedent and Plaintiff, thereby causing a significant reduction in the properties Plaintiff is to receive from the Decedent's estate." Respondent's conduct thus either intentionally or negligently "deprived Plaintiff of his reasonable future economic advantages in the assets of the Decedent's estate." The seventh cause of action for equitable estoppel includes the allegation that respondent acted "to prevent Decedent from following through with his contractual obligations" and that she refused to honor those contract obligations. The sixth cause of action for a constructive trust more directly asserts the right to "property rightfully belonging to Plaintiff pursuant to the terms of his oral contract with Decedent."

The gravamen of these claims is that appellant was deprived of property he should have received under the terms of the oral contract, but which instead passed under the

will and trust. The complaint specifically alleges that appellant is "entitled to receive as his inheritance properties substantially greater than that to which he is entitled under the Miller Family Trust of 1993 and the Decedent's Will." Thus, although respondent is the target of the second through seventh causes of action, the complaint in essence asserts a claim to the estate different from the disposition specified in the trust and will.

The circumstances presented here are not comparable to those of *Poag v. Winston* (1987) 195 Cal.App.3d 1161, cited by appellant. In *Poag*, the decedent executed an original trust containing a no contest clause, and he subsequently set up an irrevocable trust for the respondent's benefit, in partial compliance with a promise to provide for the respondent in exchange for her duties living with and taking care of him. The respondent brought an action alleging that the defendants, the decedent's conservators and trustees, had failed to comply with those promises by ejecting her from the residence, preventing her from having any contact with him, and failing to provide for her financial needs. Extensive litigation followed, continuing after the trustor's death. In one lawsuit the respondent had alleged personal tort liability of the conservators for interfering with her contractual relationship with the decedent and her prospective economic advantage. The court rejected the conservators' assertion that the respondent's civil complaint and petitions had violated the no contest clause in the decedent's original trust document. The complaint had asserted no claim to *any* of the assets of the trust or estate, nor had it posed any threat to the original trust; instead, it contained a claim *only* for damages from the defendants personally based on their failure to honor the trustor's "unequivocally expressed intent and binding promises" contained in express written and signed agreements. (*Id.* at pp. 1175, 1176, 1177.)

If the pleading at issue here alleged only damages to compensate appellant for the harm respondent caused by her conduct, independent of the disposition in the will and trust, we would distinguish those causes of action from the claims specifically directed at Dr. Miller's failure to perform—i.e., those for breach of contract and specific

performance. Appellant himself, however, makes no such distinction. He confines his argument to the complaint as a whole, insisting that he is not seeking to redistribute trust assets. As we have concluded with regard to the contract claims, the causes of action against respondent do seek to redistribute the decedent's assets. If successful, the lawsuit will remove much of the decedent's property from the Residuary-Exemption Trust (along with the income from that property) and reassign it to appellant. Although there is an incidental request for "damages according to proof at trial," the harm he claims is both a "depriv[ation] of the inheritance to which he otherwise would be entitled" and "a significant reduction in the properties Plaintiff is to receive from the Decedent's estate," as well as the concomitant deprivation "of his reasonable future economic advantage in the assets of the Decedent's estate." (Cf. *Estate of Friedman* (1979) 100 Cal.App.3d 810, 818 [proposed complaint against surviving husband seeking constructive trust was contest, as it would frustrate decedent's testamentary plan].)

### 3. *Attack on the Codicil*

Appellant next contends that even if the complaint triggers the no contest clauses in the will and trust, it does not affect the codicil, which contains no such provision. According to appellant, the codicil does not incorporate the no contest clauses in the earlier instruments; but even if it does, section 21305, subdivision (a)(2), excludes the complaint as a contest "because it seeks to determine title and ownership to property." Again we are not convinced.

Section 21305, subdivision (a), lists certain actions that "do not constitute a contest unless expressly identified in the no contest clause as a violation of the clause."<sup>4</sup>

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<sup>4</sup> Section 21305, subdivision (a), states: "For instruments executed on or after January 1, 2001, the following actions do not constitute a contest unless expressly identified in the no contest clause as a violation of the clause: [¶] (1) The filing of a creditor's claim or prosecution of an action based upon it. [¶] (2) An action or proceeding to determine the character, title, or ownership of property. [¶] (3) A challenge to the validity of an

The provision expressly applies only to instruments executed on or after January 1, 2001. As appellant points out, it was in 2007 that the decedent executed his codicil, which does not contain its own no contest clause. Consequently, appellant argues, his action would not be a contest, as it would only "determine the character, title, or ownership of property" within the meaning of section 21305, subdivision (a)(2).

Appellant's position is undermined by the application of section 21305, subdivision (c), which neither party discusses. This provision states: "Subdivision (a) does not apply to a codicil or amendment to an instrument that was executed on or after January 1, 2001, unless the codicil or amendment adds a no contest clause or amends a no contest clause contained in an instrument executed before January 1, 2001."

"Subdivision (c) helps clarify what happens when the instrument containing the no contest clause is executed before January 1, 2001, and a codicil and/or amendment is executed after that date. . . . If the testator or settlor of a pre-January 1, 2001 instrument never revisits the original no contest clause and a codicil or amendment neither adds nor changes it, then common law and the rule of strict construction govern the no contest clause of the estate plan as written. If, on the other hand, a codicil or amendment 'adds a no contest clause or amends a no contest clause contained in an instrument executed before January 1, 2001,' the specificity requirements of subdivision (a) apply." (*In re Estate of Rossi* (2006) 138 Cal.App.4th 1325, 1338-1339.) In this case, because the codicil does not explicitly revisit the no contest clause of the will or add a new one, subdivision (a) of section 21305 does not apply, and our analysis must conform to the principles articulated in *Burch*. We therefore examine the codicil strictly in light of the testator's expressed intent.

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instrument, contract, agreement, beneficiary designation, or other document, other than the instrument containing the no contest clause."

The codicil to Dr. Miller's will placed \$155,000 in trust for Stefani as income beneficiary, with Zad Leavy and appellant as co-trustees. Upon Stefani's death appellant would receive the principal. Another \$600,000 was to be placed in trust for appellant as income beneficiary, with the principal eventually to be distributed to his children. In addition, appellant was to receive two coin collections, a stamp collection, a 100-ounce silver bar, and a \$150,000 cash settlement from respondent for Dr. Miller's jewelry, gold, and silver, which were to be retained by respondent. The codicil further recognized Dr. Miller's interest in "four parcels at Gorda, in Big Sur"; appellant was to be given a right of first refusal if any successors attempted to sell those parcels for \$3 million or less. Thus, the decedent updated his testamentary intentions by giving appellant additional property and funds beyond the disposition set forth in the will and trust. As noted earlier, he also executed deeds transferring real property worth \$879,000 to appellant.

Strict construction of the codicil does not produce the result appellant seeks, because the testator has unequivocally expressed his intent. After setting forth the new bequests to appellant and Stefani, the instrument states: "In all other respects, the provisions of my Will dated January 4, 1993, shall be and hereby are approved, confirmed, republished and incorporated herein by reference." Thus, while this post-2001 document does not contain its own no contest clause or amend the no contest paragraph in the will (thereby bringing section 21305, subdivision (a), into play), it was clearly intended to be within the reach of that earlier "disinheritance device." (*Burch, supra*, 7 Cal.4th at p. 265.) Here the expression of testamentary intent is even more compelling than the instruments examined in *Estate of Hite* (1909) 155 Cal. 436, 447, where the codicils contained declarations that the testator "republishes and ratifies and confirms, his will as of the dates, respectively, of the codicils." The Supreme Court held that this language modified the original will to alter certain bequests but "expressly ratified and confirmed [the will] in all other respects." (*Id.* at p. 438.) "By such language the codicils become as much an integral part of the will as though their purport had been

expressed in one of the original clauses thereof." (*Id.* at p. 447.) Here the codicil contained more expansive language which not only confirmed and republished the nonmodified terms of the will, but incorporated them by reference.

*Scharlin v. Superior Court* (1992) 9 Cal.App.4th 162 does not alter the result. As in this case, a married couple's trust was divided into Trust A and Trust B. The trust contained a no contest clause precluding challenges to the provisions of the trust or to a deceased trustor's will. After the husband's death, the wife amended Trust A, the survivor's trust, to favor the daughter, and she added a new clause precluding any legal action to set aside the trust *or* amendments. After the wife's death the son wished to challenge the making of the amendment based on duress or undue influence by the daughter over the wife. The appellate court held that the son's proposed challenge was not a prohibited contest as to Trust B because it did not challenge the original trust agreement, but attacked the conduct leading to the amendment. The no contest provision in the original trust had not mentioned amendments, and the wife had no power to amend any part of the original trust, including the no contest clause.

The circumstances underlying the *Scharlin* holding are not comparable to the facts presented in this case. Here the decedent retained the ability to amend his own testamentary instrument and did so, through the mechanism of a codicil to his will, not only adding significant bequests to appellant but also expressly republishing and incorporating the original no contest provision.

In summary, the proposed complaint is not insulated from the forfeiture effect of the no contest clauses in Dr. Miller's will and trust. As the trial court observed, Dr. Miller "clearly expressed his intent to give his heirs only that which he designated in his estate planning documents." Appellant is now "put to an election: either to accede to the will [and] trust or to pursue the contest" and thereby relinquish his rights under those instruments. (*Genger v. Delsol, supra*, 56 Cal.App.4th at p. 1429; *Estate of Kaila, supra*, 94 Cal.App.4th 1122, 1130.)



*Disposition*

The order is affirmed.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.